Supreme Court, U.S.
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No. _____

# In the Supreme Court of the United States

EDISON K. SPEARMAN,
*Petitioner*,

v.

FORD MOTOR COMPANY,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. May a male employee singled out for harassment because of the perceived feminine manner in which he projects himself present an actionable claim for sexual harassment under Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)?

II. Can a Title VII claim of sexual discrimination be presented by a party who demonstrates that an employer investigates complaints of female sexual harassment vigorously but ignores and ridicules complaints of male sexual harassment?

## PARTIES TO THE PROCEEDING

### Petitioner

Edison K. Spearman, an individual with no corporate affiliations.

### Respondent

Ford Motor Company.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED . . . . . i

PARTIES TO THE PROCEEDING . . . . . ii

TABLE OF CONTENTS . . . . . iii

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

STATUTORY PROVISIONS INVOLVED . . . . . 1

STATEMENT OF THE CASE . . . . . 2

REASONS FOR GRANTING WRIT . . . . . 5

ARGUMENT 1 . . . . . 5

The Court Of Appeals Decision Failed To Consider The Evidence Demonstrating That The Harassment Was Motivated In Part By The Co-workers' Perception Of How Mr. Spearman Projected His Masculinity. . . . . 5

ARGUMENT 2 . . . . . 11

An Employee Who Demonstrates That His Employer Aggressively Investigates Female Complaints Of Sexual Harassment And

Disregards Male Sexual Harassment Complaints Presents A Cognizable Claim Of Sexual Discrimination Under Title VII. . . . . 11

CONCLUSION . . . . . 14

APPENDIX

**Appendix A**
Seventh Circuit Opinion, 11/3/00 . . . . . 1a

**Appendix B**
District Court Memorandum and Order on Motion for Summary Judgment, 9/9/99 . . . . . 15a

**Appendix C**
Seventh Circuit Order Denying Petition for Rehearing and Request for *En Banc* Review, 12/4/00 . . . . . 32a

**Appendix D**
District Court Final Judgment, 9/1/99 . . . . . 34a

## TABLE OF AUTHORITIES


**Cases** **Page(s)**

*Anderson v. Liberty Lobby, Inc.*,
477 U.S. 242, 106 S.Ct. 2505,
91 L.Ed.2d 202 (1986) . . . . . 10

*Bragg v. Navistar Intl'l Trans.* Corp.,
164 F.3d 373 (7th Cir. 1998) . . . . . 13

*Doe v. City of Belleville*,
119 F.3d 563, 7th Cir. (1997)
abrogated by 118 S.Ct. 1183 . . . . . 9, 10, 11

*Harris v. Forklift Systems, Inc.*,
510 U.S. 17, 114 S.Ct. 367 (1993) . . . . . 8

*Higgins v. New Balance Athletic Shoe, Inc.*,
194 F.3d 252 (f.n. 4)(1st Dist. 1999) . . . . . 6

*Los Angeles v. Manhart*,
435 U.S. 702, 98 S.Ct. 1370 (1978) . . . . . 6

*Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*,
475 U.S. 574, 106 S.Ct. 1348,
89 L.Ed.2d 538 (1986) . . . . . 10

*Meritor Savings Bank v. Vinson*,
477 U.S. 57, 106 S.Ct. 2399 (1986) . . . . . 8

*Nabozny v. Podlesny*,
92 F.3d 446 (7th Cir. 1996) . . . . . 12, 13

*Price Waterhouse v. Hopkins*,
490 U.S. 228, 109 S.Ct. 1775 (1989) . . . . . 5, 9

*Oncale v. Sundowner Offshore Services, Inc.*,
523 U.S.75, 118 S.Ct. 998 (1998) . . . . . 8, 9, 11

*Reeves v. Sanderson Plumbing Products, Inc.*,
530 U.S. 133, 120 S.Ct. 2097 (2000) . . . . . 10

*Schwenk v. Hartford*,
204 F.3d 1187 (9th Cir. 2000) . . . . . 6

*Simonton v. Runyon*,
232 F.3d 33 (2nd Cir. 2000) . . . . . 6

*Smith v. Sheahan*,
189 F.3d 529 (7th Cir. 1999) . . . . . 9

*Spearman v. Ford Motor Company*,
231 F.3d 1080 (2000) . . . . . 6

*St. Mary's Honor Center v. Hicks*,
509 U.S. 502, 113 S. Ct. 2742 (1993) . . . . . 13

*Teamsters v. United States*,
431 U.S. 324 n.15 (1977) . . . . . 12-13

**Statutes**

42 U.S.C. § 1983 . . . . . 11
42 U.S.C. § 2000e-2(a) . . . . . i
42 U.S.C. § 2000e-2(a)(1) . . . . . 1-2, 7
42 U.S.C. § 2000e-2(m) . . . . . 6

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 231 F.3d 1080 (7th Cir. 2000). A copy of the Opinion is included in the Appendix as Appendix A. The Opinion of the District Court of the Northern District of Illinois is not reported in the official reports but is reported in the unofficial reports at 1999 WL 754568 and is included in the Appendix as Appendix B. The District Court ordered entry of the final judgment on September 1, 1999, which is printed in the Appendix as Appendix D.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on November 3, 2000. On November 17, 2000, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which the United States Court of Appeals denied on December 4, 2000 and is included in the Appendix as Appendix C. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

## STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1964
42 U.S.C. § 2000e-2(a)(1)

(a) Employer practices

It shall be unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

## STATEMENT OF THE CASE

Ford Motor Company ("Ford") is an automobile manufacturer with a sheet metal stamping plant in Chicago Heights, Illinois (hereinafter referred to as "Ford Plant"). Mr. Spearman was assigned to the Ford Plant in May 1992 and, during the years in question, was part of an assembly line responsible for pressing or molding sheet metal from a machine. Two male co-workers, Gregory Curtis and Steve Neeley, also worked with Mr. Spearman on the line.

From the onset of Curtis' employment with Ford, he immediately believed Mr. Spearman was a homosexual because of the perceived feminine characteristics Mr. Spearman displayed. Curtis held this belief even though Mr. Spearman never advised anyone at Ford he was a homosexual. Curtis came to this conclusion because he believes homosexuals possess tendencies similar to those he finds in females, such as a more graceful walk or the way they express themselves with their hands. Curtis admits he believed Mr. Spearman carried some of these female tendencies and, often, Curtis and Ford employees made comments questioning Mr. Spearman's masculinity.

Curtis expressed his hostilities towards Mr. Spearman almost immediately upon his hiring at Ford in 1995. Between 1995 and 1997, Mr. Spearman frequently endured a barrage of threats of physical harm, theft of his property and gender based name calling. Often, especially during angry

confrontations, Curtis referred to Mr. Spearman as a "selfish bitch," or a "cheap-ass bitch." One co-worker understood that using the term "bitch" is the same as calling someone a woman. Another co-worker, whom Mr. Spearman did not even know at the time, called Mr. Spearman a "fucking jack-off pussy ass."

Periodically, Mr. Spearman verbally complained to management about his mistreatment and on several occasions, sent detailed written complaints to the employee relations department. Ford took little or no remedial action to the threats and harassment and did not record a written statement from witnesses until over two years following Mr. Spearman's first written complaint.

As the threats and taunts continued, co-workers' gestures and ridicule of Mr. Spearman increased. Curtis almost daily failed to report to work or return from scheduled breaks on time. Since Mr. Spearman was a utility relief worker responsible for relieving all line members for timely scheduled breaks, habitual tardiness by line workers would regularly interfere with Mr. Spearman's timely collective bargained breaks. Also within the plant, graffiti appeared depicting Mr. Spearman as a professional male entertainer (RuPaul) who regularly dresses as a female. The graffiti stated in part "RuPaul RuSpearman." Other graffiti at the plant attempted to spell Mr. Spearman's name in part with the word "sperm" ("Ed SPERMan"). In a sexual harassment training seminar at the plant, Mr. Spearman's supervisor was demonstrating an example of male on male sexual harassment to a group of co-workers and hypothesized that if Mr. Spearman attempted to touch Curtis in an inappropriate way, this could be viewed as sexual harassment. The co-workers at the seminar laughed.

In response to being informed that Mr. Spearman had identified him in a complaint submitted to labor relations, a supervisor assigned Mr. Spearman the job of cleaning the windows in a press while the machine was operating and in production. Mr. Spearman left that day and took a five month medical disability leave due to depression. During this leave, Mr. Spearman was treated at a hospital and received follow up treatment from a doctor and a therapist. Almost immediately upon returning to work from disability leave, Mr. Spearman discovered that his tool box had been vandalized and destroyed and the tools inside stolen. Despite repeated complaints, no Ford employees had been disciplined for this conduct.

In fact, the labor representatives responsible for investigating sexual harassment complaints ridiculed Mr. Spearman's complaints. Upon receiving a final written complaint, a labor representative wrote that Mr. Spearman was "the root of more problems" and that Mr. Spearman "thought" his supervisor was discriminating against him. The representative continued in an electronic transmission to other labor representatives that Mr. Spearman's complaints were causing him such "mental anguish," that he would have to visit a "neighborhood counselor" (i.e. have a beer after work).

Ford also investigated male and female complaints of sexual harassment disparately. Ford claims to have in place a "zero tolerance" policy on sexual harassment which results in these complaints being investigated promptly and thoroughly. In the five years preceding June 1, 1998, the Ford Plant received approximately twenty-five formal complaints of sexual harassment, with Mr. Spearman's complaint being the only male complaint of sexual harassment. In implementing this "zero tolerance" policy,

Ford admits other complaints of female sexual harassment at the Ford Plant are addressed thoroughly and promptly. Mr. Spearman's complaints of sexual harassment, however, were made the subject of jokes by management and co-workers. In fact, almost two years passed before Ford first recorded written statements of witnesses, and no employee has been disciplined for the conduct directed towards Mr. Spearman.

## REASONS FOR GRANTING WRIT

### ARGUMENT 1

### THE COURT OF APPEALS DECISION FAILED TO CONSIDER THE EVIDENCE DEMONSTRATING THAT THE HARASSMENT WAS MOTIVATED IN PART BY THE CO-WORKERS' PERCEPTION OF HOW MR. SPEARMAN PROJECTED HIS MASCULINITY.

If a female is singled out for disparate treatment because she fails to conduct herself in a manner typically associated with females, or because she is perceived to be too masculine in her presentation and demeanor, an actionable claim under Title VII for sex discrimination is presented. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250,109 S.Ct. 1775, 1790-91 (1989). Conversely, if a man is singled out for harassment because he is perceived as failing to present himself in a manner typically associated with males, or because he is perceived to be too feminine in his presentation and demeanor, an equal application of the law dictates that a claim under Title VII is presented.

The issue of male sexual harassment under Title VII based on sexual stereotype has not been addressed by this

court. If an employer is forbidden from making employment decisions predicated on "stereotyped" impressions that males or females cannot perform certain tasks (*Los Angeles v. Manhart*, 435 U.S. 702, 707, 98 S.Ct. 1370, 1375 (1978)), then this court should decide the equally important issue of male sexual harassment based on stereotypical impressions. Other courts outside the Seventh Circuit have looked favorably on the issue. The Second Circuit in *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000) discussed, but did not decide, the issue of sexual stereotyping and whether or not a male could present a cognizable claim under Title VII using this theory. The court pointed out that such a claim would not "bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine . . . " *Simonton*, 232 F.3d at 38. As *Simonton* notes, other cases have likewise found that Title VII should forbid discrimination based upon a failure to meet stereotypical masculinity expectations. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (f.n. 4)(1st Dist. 1999); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

Respectfully, the published decision of the court of appeals affirming the entry of summary judgment to Ford disregarded the evidence submitted by Mr. Spearman in support of this claim and assumed that the perpetrators in this instance were motivated in their conduct because of Mr. Spearman's sexual orientation, not because of his sex. Referring to Mr. Spearman as a "bitch" and comparing him to a professional entertainer whose routine is to dress in female costume, the court of appeals concluded, purportedly confirmed that these workers were hostile to his sexual orientation, not his "sex." *Spearman v. Ford Motor Company*, 231 F.3d 1080, 1086 (2000). However, Mr. Spearman never advised anyone at the Ford Plant that he was a homosexual. Therefore, it was erroneous for the court of

appeals to conclude co-workers acted because of Mr. Spearman's sexual orientation since co-workers were not certain of his preference.

Further, the words used to describe Mr. Spearman indicate the motive for the co-workers' actions. The court of appeals' conclusion on why co-workers acted ignores evidence presented by Mr. Spearman and wrongly assumes motivating conduct must be mutually exclusive: i.e., if co-workers acted because of a co-worker's perceived sexual orientation, they could not possibly act because of his "sex." Congress, however, has concluded that where there is more than one motivating factor for this mistreatment, Mr. Spearman may recover if sex was a "motivating factor" in the co-workers' actions, "even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

Certainly, Mr. Spearman has presented sufficient evidence, which was not considered by the court of appeals, for a jury to conclude "sex" was a motivating factor in the action taken against him. Since judgment was entered against Mr. Spearman in response to a motion for summary judgment, the court of appeals should have considered all of the evidence in a light most favorable to Mr. Spearman and allowed a jury to determine if Mr. Spearman's "sex" was a motivating factor for the harassment. Conversely, the trial court considered the evidence and the issue extensively and found Mr. Spearman was in fact singled out because of his sex. App. B at 27a.

Section 703(a)(1) of Title VII makes it an unlawful employment practice "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). A

plaintiff may make out a Title VII violation by proving that discrimination based on sex has created a hostile or abusive work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S.Ct. 2399, 2405 (1986). If the harassment is so "severe and persuasive" as to alter the victim's employment and thereby create an "abusive working environment," Title VII is violated. *Id.*, at 67, 106 S.Ct. at 2405-06 (citation omitted). To be actionable, the hostility must be objectionable both objectively and subjectively; hostility that a reasonable person and that plaintiff himself find abusive and hostile. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 371 (1993).

Recently, the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.75, 81, 118 S.Ct. 998, 1002 (1998) held that same sex harassment is actionable under Title VII so long as a plaintiff proves the discrimination was "because of . . . sex." Although this court in *Oncale* set forth examples of the method of proof a plaintiff may use to present an actionable Title VII claim of sexual harassment, this Court has not addressed the viability of a male's claim of sexual stereotyping under Title VII. In a case similar to this case, *Doe v. City of Belleville*, 119 F.3d 563, 580-81, 7th Cir. (1997) abrogated by 118 S.Ct. 1183 for analysis in light of *Oncale*, the Seventh Circuit held that where a male was singled out by male co-workers for abuse because of the way he projected his gender and because he did not conform to co-workers' view of appropriate masculine behavior, a claim under Title VII is presented. Although vacated by *Oncale*, *Doe's* rationale is not defective even in light of *Oncale*.[1] In

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[1] Judge Rovner, presents in *Doe* a thoroughly researched historical analysis on why sexual stereotyping of males is an action "because of . . . sex" under Title VII.

*Oncale*, the Supreme Court recognized that a plaintiff is not required to prove sexual attraction as the motivation for the harassment. *Oncale*, 118 S.Ct. at 1002. Although the Court noted as two examples of same sex harassment where the perpetrator is not a homosexual (one where there is evidence of hostility to the presence of a specific gender and the other via evidence of treatment of opposite sex members (*Oncale*, 118 S.Ct. 1002)), these examples were not exhaustive. In fact, *Oncale* involved all-male actors without evidence of all-male bias. *Doe* also recognized that one may be discriminated against on the basis of "sex" when referenced or designated in gender specific language. *Doe*, 119 F.3d at 580. See also, *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999) (gender based and sexually charged epithets directed towards a victim may provide a jury with evidence that the perpetrator's actions are based on sex).

As it relates to women, the Supreme Court has recognized that sexual stereotyping is actionable conduct based on "sex" under Title VII. In *Price Waterhouse*, the Supreme Court found that an actionable claim under Title VII may be presented where the evidence shows that sex stereotyping played a motivating role in the decision challenged. *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. at 1790-91. This court should decide the equally important issue that harassment against men based on sex stereotyping is actionable under Title VII. Here, Mr. Spearman's co-workers have demanded certain features of masculinity in the male workers' appearance. If workers do not exhibit these features, action is taken in the form of assault, ridicule and contempt. Not fitting that mold of the ideal male, Mr. Spearman endured the campaign of harassment described. In short, Ford's employees took action because Mr. Spearman was not a "true" male in the eyes of the employees. Just as when an employer denies job opportunities because a woman

applicant is too aggressive and that women in general should not be, Mr. Spearman may present a Title VII claim if the terms and conditions of his employment are altered because he was not aggressive enough and men in general should be.

The evidence in this case was sufficient to allow a jury to decide if the harassment endured by Mr. Spearman was because of sex. By Curtis' own admissions, he believes he is able to detect feminine characteristics in Mr. Spearman. Curtis and co-workers constantly questioned Mr. Spearman's masculinity and Curtis himself reportedly referred to plaintiff with a barrage of gender based names (e.g., "cheap ass bitch," "selfish bitch") which one co-worker understood to mean the equivalent of calling someone a woman. Another co-worker referenced female anatomy in referring to Mr. Spearman (i.e., "pussy ass"). In one instance, Mr. Spearman was identified in graffiti as a male entertainer, RuPaul, who dresses as a female. Since the terms used by the co-workers to degrade and humiliate plaintiff were gender based, a jury could conclude that Ford employees were engaging in "sex stereotyping." *Doe*, 119 F.3d at 580.

On summary judgment, the court should review all of the evidence in the record and draw all reasonable inferences in favor of the party opposing the motion. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Even though the court is to review the record as a whole, "it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, ___, 120 S.Ct. 2097, 2110 (2000). The court should not make credibility determinations and weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). These functions and the drawing of legitimate

inferences from facts is not for the court but for the jury. *Id.* Mr. Spearman contends that there is sufficient evidence for the jury to conclude he was harassed because of his sex. A jury was not required to believe Mr. Spearman was harassed because of his sexual preference.

## ARGUMENT 2

### AN EMPLOYEE WHO DEMONSTRATES THAT HIS EMPLOYER AGGRESSIVELY INVESTIGATES FEMALE COMPLAINTS OF SEXUAL HARASSMENT AND DISREGARDS MALE SEXUAL HARASSMENT COMPLAINTS PRESENTS A COGNIZABLE CLAIM OF SEXUAL DISCRIMINATION UNDER TITLE VII.

During the time of the incidents complained of, the Seventh Circuit held that males singled out for harassment because of the way they projected their gender and because of their non-conformity with a perceived masculine behavior have actionable claims under Title VII. *Doe*, 119 F.3d at 580-81. Mr. Spearman presented unrebutted evidence that complaints of female sexual harassment receive prompt remedial action from Ford in furtherance of Ford's Title VII obligations. However, the only male employee claim of sexual harassment was not only disregarded, but Ford officials engaged in the very abusive ridicule which led to the Title VII claim itself. The investigator joked to colleagues about Mr. Spearman's complaint. Mr. Spearman was subjected to ridicule by supervisors and co-workers and much of the harassment occurred in the presence of supervisors. Mr. Spearman contends male complaints of actionable sexual harassment were disregarded while female complaints were

promptly addressed. This type of disparate treatment of male and female complaints is actionable under Title VII.

*Nabozny v. Podlesny*, 92 F.3d 446, 454-56 (7th Cir. 1996) involved a male student's complaints of harassment by other students. The student brought a claim under 42 U.S.C. § 1983 and the Seventh Circuit held that the Equal Protection Clause prohibited a school district from protecting the rights of female students to be free from sexual harassment while disregarding similar male complaints of sexual harassment. Like the Plaintiff in *Nabozny*, Ford disregarded Spearman's claims and ridiculed his complaints. This evidence of difference in treatment among members of the opposite sex is probative of Ford's intent to treat male employees differently than female employees.

Although *Nabozny* admittedly involved an Equal Protection claim and not a Title VII claim, the manner of proving the Equal Protection claim supports the showing of sex discrimination in Mr. Spearman's claim. The fact that the school district in *Nabozny* took prompt and remedial action for complaints of female harassment claims but disregarded the single male complaint of harassment was sufficient to show that males and females were treated differently when it came to the school district's investigation of complaints of harassment. See, *Nabozny*, 92 F.3d at 454-55 ("[w]e find it impossible to believe that a female lodging a similar complaint would have received the same response"). Like the "boys will be boys" response of the school district in *Nabozny*, Ford's investigator took a similar attitude by ignoring the complaint and ridiculing Mr. Spearman's claims.

Discriminating intent is inferred "from the mere fact of differences in treatment" in investigating complaints of sexual harassment of different sexes. *Teamsters v. United*

*States*, 431 U.S. 324, 335, n.15 (1977). Mr. Spearman presented a prima facie case of sexual discrimination by presenting evidence that he: 1) is a member of a protected class (i.e., male); 2) he was qualified for the job and met the legitimate expectations of his job; 3) he suffered an adverse employment action in the form of harassment and inaction towards his complaints; and 4) Ford treated similarly situated females more favorably. *Bragg v. Navistar Intl'l Trans.* Corp., 164 F.3d 373, 376 (7th Cir. 1998) (citation omitted). *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 113 S. Ct. 2742, 2753-54 (1993). Ford's own labor relations supervisor admits that claims of female sexual harassment are vigorously pursued whereas the evidence shows Mr. Spearman's claim, a male claim, is ridiculed and ignored. Mr. Spearman presented a prima facie case of sex discrimination in the manner Ford investigates complaints of sexual harassment for male and female employees. Ford failed to proffer a legitimate, nondiscriminatory reason for its conduct in light of Plaintiff's prima facie case. Judgment in favor of Mr. Spearman should have been entered. *Hicks*, 509 U.S. at 509, 113 S.Ct. at 2748.

## CONCLUSION

For all of the reasons identified herein, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate and reverse the entry of summary judgment for Ford below and remand the matter to the District Court for trial.

Respectfully submitted,

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## APPENDIX A

***IN THE***
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

[Filed November 3, 2000]

No. 99-3538

EDISON K. SPEARMAN,
*Plaintiff-Appellant,*

v.

FORD MOTOR COMPANY,
*Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 98 C 452--David H. Coar, Judge

Argued April 5, 2000-Decided Nov. 3, 2000.

Before MANION, KANNE, and EVANS, Circuit Judges.

MANION, Circuit Judge. Edison Spearman sued his current employer, Ford Motor Company, alleging that Ford

violated Title VII by subjecting him to a hostile environment of sexual harassment, retaliating against him for opposing sexual harassment, and for discriminating against him on the basis of his sex. Ford moved for summary judgment, which the district court granted. Spearman appeals, and we affirm.

## I.

Edison Spearman is a black man and a homosexual [1] who has been working for Ford since 1990. In October 1995, Spearman worked as a "blanker operator" at Ford's Chicago Heights Stamping Plant, where he operated press machines that "blank" or "stamp" sheet metal into dimensional form. In the summer of 1997, Spearman was promoted to the position of "blanker utility" worker, and assigned to relieve two blanker operators (Gregory Curtis and Steve Neeley) for their work breaks, lunch breaks and other rotations.

Spearman filed his first of several complaints of harassment on December 8, 1995, in which he reported that since his assignment as a blanker operator in October 1995, Curtis constantly took personal items (pens, newspapers, and gloves) from him without his permission. When Spearman told Curtis to stop, Curtis (a black man) called Spearman a "nigger" and a "selfish bitch." Curtis would also hound Spearman for lunch money, and then call him a "cheap ass bitch" if his requests were occasionally denied. Following a

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[1] Spearman testified at his deposition that he is a homosexual, but he claims that he never made that known to anyone at Ford.

glove-snatching incident, Spearman had two meetings with his union representative and Curtis to resolve the matter.

Spearman reported no further incidents of harassment until May 16, 1997, when he filed a written complaint concerning an altercation with Curtis over the timing of lunch breaks. Curtis confronted Spearman, called him a "little bitch," told him that he hated his "gay ass," and threatened to go to Spearman's residence in Indiana and "f---- [his] gay faggot ass up." To defuse the situation, a foreman assigned Spearman and Curtis to different press areas for the balance of the shift. The following week, labor relations investigated the matter and held two meetings with Spearman, Curtis and a union representative.

Curtis and Neeley testified that they and their co-workers at Ford suspected that Spearman was a homosexual. According to Curtis, he thought that Spearman was homosexual when they first met and Spearman supposedly took "a full look" at Curtis like a man would look at a woman. Curtis also opined that other blanker operators at Ford were uncomfortable with Spearman because they observed that he "looked [them] over" like a man would "take a full look" at a woman, that he got too close to his male co-workers when he talked to them, and even "rubbed up especially close" to some of them. Curtis also testified that one coworker started "squirming" when others teased him that Spearman had a "crush" on him. And Curtis also claimed that his brother-in-law and a coworker told him that they saw Spearman at gay nightclubs.

According to Spearman, Curtis continually harassed him after the May 1997 incident by reporting to work late and

returning from his breaks late in order to disrupt Spearman's relief schedule as a utility worker, and thus deprive him of his breaks and lunches. Curtis's negative behavior toward Spearman continued until he was moved to another press machine (and away from Spearman) in October 1997.

Spearman submitted another written complaint concerning a June 21, 1997 argument with Neeley over the timing of a break. As a blanker utility worker, Spearman told Neeley to take a break, but Neeley refused, leaned into Spearman's face, and taunted him by telling Spearman to hit him. In his complaint, Spearman wrote: "[T]here's a constant problem with Steve, when it comes to breaks; since I've become utility, he rebels and insist [sic] on debating me about how and when I relieve." Labor relations responded by conducting a meeting with all of the parties involved in the matter.

In June 1997, Spearman discovered graffiti on the bulletin board that stated: "Aids kills faggots dead . . . RuPaul, RuSpearman."[2] Spearman waited five months to report the incident, and when he did, labor relations representatives promptly painted over it the following day.

On October 21, 1997, Spearman delivered another complaint to Ford that involved an altercation with George Pearson (who was temporarily assigned to work with Spearman) about the timing of a break. While Pearson was leaving his work station, he said to Spearman, "You f----ing jack-off, pussy-ass," and saluted Spearman with his middle

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[2] RuPaul is the name of a black, male drag queen and entertainer.

finger. Spearman reported the incident to his foreman, Anthony Perez, who assured Spearman that he would discuss the matter with Pearson and "discipline him." Shortly after Spearman filed his complaint about the incident, a labor relations representative investigated the matter and conducted a meeting with Spearman and his union representative.

In November 1997, Spearman discovered more graffiti outside a portable toilet that stated: "Ed Sperman [sic] is a fag and has AIDS" and "Edison Sperman [sic] is gay." Labor relations representatives painted over the graffiti immediately after Spearman's report.

Ford received another letter from Spearman around November 24, 1997, in which he complained that he was being harassed by Perez, who used the following instructional hypothetical at a department meeting about sexual harassment:

> Say for instance, Greg and Ed are in the back bringing in a coil, and Ed touches Greg in a way that made him feel uncomfortable, that can be a charge of sexual harassment.

Spearman believed that Perez's hypothetical was about himself (Ed) and Greg Curtis, and thus it was "totally inappropriate" and harmful to Spearman because he and Curtis had been involved in several altercations in the past. Perez testified that he was not referring to Spearman in the example, but to Ed Rolff, one of Spearman's co-workers.

In the same letter, Spearman also complained that Perez had offered to give him a hug on two separate occasions. On the first occasion, Spearman admits that Perez

greeted him with a hug because he showed up for work during a staff shortage in the summer of 1997. But Spearman stated that he "felt very awkward" about Perez's second offer of a hug that occurred when Spearman was confused about overtime duties and consulted Perez for advice. Perez testified that Spearman appeared to be distraught because the press machine was not working, and that Perez offered to give him a hug to lift his spirits.

During the afternoon of November 24, 1997, Perez instructed Spearman to perform housekeeping duties and wash the windows of the press machines for about an hour before the end of his shift. Spearman believed that his assignment was punitive and that Perez was retaliating against him for his November 17, 1997 harassment complaint about Perez's instructional hypothetical and offers to hug Spearman. He left work that day, went on medical leave in December 1997, and did not return to work until May 4, 1998. Perez testified that he assigned similar housekeeping tasks to other utility workers and operators to keep them busy when they were not operating the press machines.

During his medical leave, Spearman received treatment for depression. When he returned to work after a five-month absence, he discovered that his tool box was destroyed and that his tools had been stolen.

Spearman then sued Ford, alleging that it violated Title VII by subjecting him to a hostile environment of sexual harassment; by retaliating against him because he filed complaints opposing sexual harassment; and by discriminating against him because of his sex by failing to investigate his sexual harassment complaints as promptly as similar

complaints from female employees. Ford moved for summary judgment. The district court granted Ford's motion, concluding that while Spearman established a reasonable inference that he was harassed because of his sex, his sexual harassment claim failed because he did not show that the harassment was severe enough to cause a change in his employment conditions. The district court also denied Spearman's retaliation claim by concluding that he failed to establish a prima facie case by showing that he suffered an adverse employment action. The court did not address Spearman's sex discrimination claim. Spearman appeals.

## II.

"We review the district court's entry of summary judgment *de novo*," *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1003 (7th Cir. 2000), viewing all of the facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party. *Id.* Summary judgment is proper if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999) (citing Fed.R.Civ.P. 56(c)).

Title VII prohibits an employer from harassing an employee "because of [the employee's] sex."[3] *Oncale v.*

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[3] This provision of Title VII provides that: "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

*Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); 42 U.S.C. § 2000e-2(a)(1). Same-sex sexual harassment is actionable under Title VII "to the extent that it occurs 'because of' the plaintiff's sex." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir. 1999). We have stated that "[t]he phrase in Title VII prohibiting discrimination based on sex" means that "it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). In other words, Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation. *See id.* at 1087. Therefore, harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII. *Id.* at 1085; *see also Hamner v. St. Vincent Hosp. and Health Care Center, Inc.*, 224 F.3d 701, 704 (7th Cir. 2000).

**A. Hostile Environment Claim**

Spearman first argues on appeal that he was sexually harassed at Ford in violation of Title VII. He claims that the vulgar and sexually explicit insults and graffiti of his harassers were motivated by "sex-stereotypes" because his co-workers perceived him to be too feminine to fit the male image at Ford. His contention relies primarily on Curtis's testimony that there is a "masculine" environment at the Ford plant, implying that he questioned Spearman's masculinity. Spearman also contends that Curtis engaged in sex stereotypes when he called Spearman a "bitch," which, according to another utility worker at Ford (David Gibson), meant that Curtis called Spearman a "woman." Moreover, Spearman

asserts that the graffiti associating him with a drag queen (RuPaul) proves that his co-workers perceived him to be too feminine to work at Ford. And he claims that sex stereotypes motivated Perez to harass him with the window-washing assignment, which is a function "traditionally reserved for women" (a view that could also be labeled sex stereotyping).

While sexually explicit language may constitute evidence of sexual harassment, it is not "always actionable, regardless of the harasser's sex, sexual orientation, or motivations." *See Oncale*, 523 U.S. at 79, 118 S.Ct. 998. The plaintiff must still show that he was harassed because of his sex. *Id.* Similarly, while sex stereotyping may constitute evidence of sex discrimination, "[r]emarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff's] gender in making its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Therefore, according to *Oncale* and *Price Waterhouse*, we must consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole creates a reasonable inference that the plaintiff was discriminated against because of his sex.

Here, the record clearly demonstrates that Spearman's problems resulted from his altercations with co-workers over work issues, and because of his apparent homosexuality. But he was not harassed because of his sex (i.e. not because he is a man). His harassers used sexually explicit, vulgar insults to express their anger at him over work-related conflicts.

However, these conflicts did not arise because he is a man. Curtis directed insults at Spearman to irritate or provoke him during three specific arguments about lunch money, small personal items, and the timing of lunch breaks. And Pearson directed a barrage of derogatory remarks at Spearman after he unsuccessfully protested Spearman's order to take a break. It is clear that Curtis and Pearson lodged sexually explicit insults at Spearman to express their acrimony over work-related disputes, and not to harass him because he is a man; and such conduct does not constitute sexual harassment. *See Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997) (sexually explicit remarks among male co-workers were "simply expressions of animosity or juvenile provocation," and were not directed at the plaintiff because of his sex).

The record also shows that Spearman's co-workers maligned him because of his apparent homosexuality, and not because of his sex. The testimonies of Curtis and Neeley clearly demonstrate that Spearman's harassers were motivated by their suspicion of Spearman's sexual orientation and his perceived desire for some sort of physical intimacy with them. And even Spearman's understanding of Perez's instructional hypothetical indicates that Perez teased him about his homosexuality. Moreover, Spearman's coworkers directed stereotypical statements at him to express their hostility to his perceived homosexuality, not to harass him because he is a man. *See Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775. Curtis called him a "bitch" which, according to Gibson, means a "woman," or a "faggot." And the graffiti that specifically stated that Spearman is "gay," a "fag," and compared him to a drag queen confirms that some of his co-workers were hostile to his sexual orientation, and not to his sex.

Title VII is not a "general civility code" for the workplace, *see Oncale*, 523 U.S. at 81, 118 S.Ct. 998; it does not prohibit harassment in general or of one's homosexuality in particular. Likewise, sexually explicit insults that arise solely from altercations over work-related issues, while certainly unpleasant, do not violate Title VII. Because Spearman was not harassed because of his sex, his hostile environment claim fails. *Oncale*, 523 U.S. at 78, 118 S.Ct. 998.

**B. Retaliation Claim**

Spearman's next argument on appeal is that Perez assigned him the window-washing task to retaliate against him for his written complaint about Perez's harassment, in violation of Title VII.

Title VII "protects persons not just from certain forms of job discrimination [and harassment], but from retaliation for complaining about the types of discrimination it prohibits."[4] *Miller*, 203 F.3d at 1007; 42 U.S.C. § 2000e-3(a). To prevail on a claim of retaliation, the plaintiff must show that: (1) he complained about conduct that is prohibited by Title VII; (2) he suffered an adverse employment action; and (3) the adverse employment action was caused by his opposition to the unlawful employment practice. *Miller*, 203

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[4] The retaliation provision of Title VII provides that: "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e- 3(a).

F.3d at 1007. An "adverse employment action" alters the "terms or conditions" of one's employment. *Silk,* 194 F.3d at 804. It "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits as well as the 'denial of a raise or promotion.' " *Id.* at 804 n. 16 (quoting *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)).

Here, Perez assigned Spearman to wash the windows of his two press machines for about an hour. Spearman argues that the assignment was "degrading and punitive" and thus diminished his job responsibilities as a utility worker. But he also testified that he performed housekeeping duties as a utility worker before, including sweeping around the press machines and removing trash from the plant floor. Thus, the additional task of washing the windows of the press machines certainly did not "significantly" alter (if at all) the terms and conditions of his employment. Perez testified that the cleaning assignments were to keep Spearman busy with necessary cleanup chores rather than having him "standing there doing nothing" for an hour or so before his relief duties were to begin. The assignment was nothing more than "a mere inconvenience or an alteration of job responsibilities," *Crady v. Liberty Nat. Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993), and thus Spearman's retaliation claim fails.[5]

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[5] The retaliation claim also fails because Spearman's numerous complaints of co-worker abuse did not involve an unlawful employment practice under Title VII, and there is no evidence in the record that he even had a subjective belief that he

**C. Sex Discrimination Claim**

Spearman's last claim on appeal is that Ford discriminated against him on the basis of his sex by failing to investigate his alleged sexual harassment complaints as promptly as it investigated sexual harassment complaints from female employees. To raise a prima facie case of sex discrimination, Spearman must show that: (1) he belongs to a protected class (in this case, males); (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) Ford treated similarly situated female employees more favorably. *See Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 863 (7th Cir. 1997).

Spearman's discrimination claim does not meet the fourth test of the prima facie case. We have already established that none of his complaints involved sexual harassment, and there is no evidence in the record that demonstrates that Ford perceived Spearman's complaints to be about sexual harassment at the time he filed them. Therefore, Spearman does not show that he was similarly situated to female employees who filed sexual harassment complaints. Furthermore, the record demonstrates that Ford sought to resolve Spearman's complaints with investigations, meetings, and by promptly painting over graffiti. Spearman provides no evidence that Ford responded more vigorously to sexual harassment complaints from female employees. Because Spearman's complaints were not about sexual harassment, and he provides no comparative evidence to support his disparate

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was being sexually harassed. *See Hamner*, 224 F.3d at 707.

treatment claim, it fails.[6] *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 204 (7th Cir. 1996).

## III.

Although the district court determined that there was evidence that Spearman was sexually harassed, but granted summary judgment for Ford by concluding that the harassment was not severe or pervasive enough to cause a change in Spearman's employment conditions, we conclude that Spearman's sexual harassment (hostile environment) claim fails because he was not harassed because of his sex; his retaliation claim fails because he did not suffer an adverse employment action; and his disparate treatment claim fails because he has not shown that he was similarly situated to female Ford employees who filed sexual harassment complaints, or that Ford treated female employees more favorably. We AFFIRM.

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[6] It is also questionable whether Spearman ever suffered an adverse employment action, but because we conclude that his sex discrimination claim fails because there is no evidence that he meets the fourth test of a prima facie case, we decline to address this issue.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Filed September 9, 1999]

No. 98 C 0452

EDISON K. SPEARMAN,
*Plaintiff*,

vs.

FORD MOTOR COMPANY,
*Defendant*.

HONORABLE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Before this court is defendant Ford Motor Company's ("defendant" or "Ford") motion for summary judgment on plaintiff Edison K. Spearman's ("plaintiff" or "Spearman") two count complaint brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., for sexual harassment and retaliation. For the following reasons, the defendants' motion is GRANTED.

**Statement of Facts**

The plaintiff Spearman has worked at Ford's Illinois Ford Heights Stamping Plant since 1992. (Dft's 12(M) Stmt. ¶ 1). Spearman started at the plant as a Blanker Operator and was promoted to the position of Blanker Utility in June of 1997. (Dft's 12(M) Stmt. ¶¶ 4--7). Blanker Operators feed sheet metal coil into press machines and monitor the machine's operation. Blanker Utilities assist the Blanker Operators and relieve the Blanker Operators for breaks and rotations. (Dft's 12(M) Stmt. ¶ 5). When Spearman was promoted to Blanker Utility, the two Blanker Operators he worked with were Gregory Curtis ("Curtis") and Steve Neeley ("Neeley"). (Dft's 12(M) Stmt. ¶ 7). Spearman still works as a Blanker Utility, but he has not worked on the same set of machines as Curtis and Neeley since May of 1998. (Dft's 12(M) Stmt. ¶ 8).

Most of the incidents in question occurred in the later half of 1997, but Spearman states that they began as early as 1995. (Dft's 12(M) Stmt. ¶ 9; Pl's 12(M) Resp. ¶ 9). The incidents involve primarily Curtis, Neeley, and Spearman's supervisor Anthony Perez ("Perez").

**The Curtis Incidents**

Spearman states that incidents involving Curtis began as early as October, 1995. (Dft's 12(M) Stmt. ¶ 17; Pl's 12(N) Stmt. ¶ 15). These incidents consisted mostly in crude comments. For example, Curtis would regularly ask to borrow money from Spearman for lunch. When Spearman would decline, Curtis would call Spearman a "nigger," a "selfish bitch," and a "cheap ass bitch." (Dft's 12(M) Stmt. ¶

18; Pl's 12(N) Stmt. ¶ 20). Another incident occurred in December of 1995, at the beginning of a work shift, when Spearman had a new pair of work gloves in his back pocket. After Curtis had looked for a pair of gloves in the department glove box for himself, he turned to Spearman, took the new gloves out of Spearman's back pocket, and said, "Nigger, I'm taking those." (Pl's 12(N) Stmt. ¶ 18). Spearman said no and asked for the gloves back, but Curtis refused to return the gloves.(Dft's 12(M) Stmt. ¶ 19; Pl's 12(N) Stmt. ¶ 19). Spearman submitted a written complaint about the incident to a union official on December 5, 1995. (Dft's 12(M) Stmt. ¶ 20; Pl's 12(N) Stmt. ¶ 21).

No other incidents were reported until May 15, 1997, when Curtis and Spearman had a disagreement over the timing of a lunch break. When Spearman informed Curtis that he was going to relieve him early for his lunch break, Curtis confronted Spearman and called him a "little bitch." (Pl's 12(N) Stmt. ¶ 23). While Spearman reported this incident to the foreman and the union representative at the plant, Curtis responded by threatening to go to where Spearman lived and "fuck [his] little gay ass up." (Dft's 12(M) Stmt. ¶ 23, 28; Pl's 12(N) Stmt. ¶ 23). Plant officials then assigned Spearman and Curtis to separate press machines for the rest of the shift. (Dft's 12(M) Stmt. ¶ 28). The next day, Spearman submitted a written statement of events to the Labor Relations Office at Ford. (Dft's 12(M) Stmt. ¶ 29; Pl's 12(N) Stmt. ¶ 25). The Labor Relations Office scheduled a meeting between Spearman and Curtis to discuss the incident. At that meeting, Labor Relations Officials counseled Spearman and Curtis on "how to get along" and told Spearman and Curtis that they had good jobs and should not fight. (Dft's 12(M) Stmt. ¶ 30; Pl's 12(N) Stmt. ¶ 26). Ford states that the Labor Relations

office conducted a follow up investigation after this meeting, while Spearman states that no one ever questioned him about the incident and an investigation did not occur until November of 1997. (Dft's 12(M) Stmt. ¶ 30; Pl's 12(N) Stmt. ¶¶ 26, 27).

**The Neeley Incidents**

The incidents involving Neeley all occurred in 1997. In May of 1997, Neeley and Spearman had a confrontation over a piece of damaged equipment on the work floor. Spearman was reporting the damage to the foreman when Neeley lunged forward and started yelling, "shut the fuck up, Ed, shut the fuck up." (Dft's 12(M) Stmt. ¶ 35; Pl's 12(N) Stmt. ¶ 22). The foreman, Lance Lahew, shrugged his shoulders and laughed. He stated to on-looking co-workers that the exchange was only "shop talk" and the co-workers started to laugh. (Dft's 12(M) Stmt. ¶¶ 35, 36; Pl's 12(N) ¶ 22). As the foreman and other co-workers began examining the damaged equipment, Neeley leaned over and whispered into Spearman's ear that he knew that he could say anything he wanted to Spearman as long as he did not touch him. (Dft's 12(M) Stmt. ¶ 37). Spearman submitted a written complaint about the incident to the Labor Relations Office. (Dft's 12(M) Stmt. ¶ 37).

Another incident occurred between Neeley and Spearman over the timing of a break; however, neither party stated when the incident occurred. Neeley started shoving up against Spearman and said in his ear, "Hit me, I know you want to hit me, hit me." Spearman said no and told Neeley to leave him alone. (Dft's 12(M) Stmt. ¶ 40; Pl's 12(N) Stmt. ¶ 30). Later on in the shift, when Spearman was reporting the

incident to a fellow employee, Neeley walked up and said to Spearman, "Don't turn people against me. I know a lot more people than you." (Dft's 12(M) Stmt. ¶ 41). Spearman submitted a written complaint to the Labor Relations Office, and the Labor Relations Office held a meeting between Spearman, Neeley, and the union representative.[1] (Dft's 12(M) Stmt. ¶ 44).

**The Pearson Incident**

In October of 1997, when Spearman was relieving a coworker named George Pearson for his break, Pearson called Spearman a "fucking jag-off pussy ass" and made a crude hand gesture with his middle finger. (Dft's 12(M) Stmt. ¶ 45; Pl's 12(N) Stmt. ¶ 31). Spearman reported the incident to his supervisor, Perez, and Perez discussed the incident with Pearson. (Dft's 12(M) Stmt. ¶¶ 46, 47). Spearman submitted a written complaint to the Labor Relations Office. (Dft's 12(M) Stmt. ¶ 49).

**Interactions with Perez**

Spearman presents two incidents where his supervisor, Perez, hugged him or attempted to hug him. In the first incident, Perez greeted Spearman at the beginning of his shift by approaching Spearman and giving him a hug in front of two employees. Spearman admits that the hug was non-sexual in nature. (Dft's 12(M) Stmt. ¶ 53). The second occurrence was in November of 1997, when Perez offered to give Spearman a hug when they were discussing the scheduling of

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[1] Neither party submitted what occurred in that meeting.

breaks. (Dft's 12(M) Stmt. ¶ 60). After the incident, Perez asked Spearman if he was offended by the offer, and Spearman answered no. (Dft's 12(M) Stmt. ¶ 61). Spearman submitted a written complaint about this incident on November 17, 1997. (Pl's 12(N) Stmt. ¶ 39).

The other incident involving Perez occurred in October, 1997 during a sexual harassment training for plant workers. In a meeting that included 10 to 15 workers, Perez was presenting the sexual harassment policy of Ford. (Dft's 12(M) Stmt. ¶ 54). He used various hypotheticals to describe potential sexual harassment situations. In one hypothetical, he described "Ed" touching "Greg" in a way that made "Greg" feel uncomfortable. (Dft's 12(M) Stmt. ¶ 55; Pl's 12(N) Stmt. ¶ 33). Ed is Spearman's first name and Greg is Curtis' first name. The other coworkers at the meeting began to laugh at the example. (Pl's 12(N) Stmt. ¶ 38). However, Perez states that he was not referring to Spearman in his example, but to Ed Rolff, one of Spearman's coworkers. (Pl's 12(N) Stmt. ¶ 34).

**Graffiti**

Spearman reported several pieces of graffiti throughout the plant that referred to him personally in a derogatory manner. In June of 1997, on the bulletin board near the work area, graffiti was carved into the board that stated, "AIDS kills," "faggots dead," and "RuPaul RuSpearman."[2] (Dft's 12(M) Stmt. ¶ 66; Pl's 12(N) Stmt. ¶ 28). Spearman did not report the graffiti at first, because he did not want his

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[2] RuPaul is the name of a male entertainer who cross-dresses as a woman.

coworkers to see his reaction. (Pl's 12(M) Resp. ¶ 67). After the other various incidents had occurred, Spearman finally reported the graffiti on November 14, 1997. Once he reported the graffiti, two Labor Relations Office employees accompanied Spearman to the bulletin board and painted over the graffiti. (Dft's 12(M) Stmt. ¶ 68).

In November of 1997, more graffiti appeared outside of the portable toilet near the work area. On the wall of the portable toilet was written "Ed SPERMan" and comments that Spearman was gay and that Spearman had AIDS. (Dft's 12(M) Stmt. ¶ 69). Spearman reported the graffiti to the Labor Relations Office. (Dft's 12(M) Stmt. ¶¶ 70, 71). The Labor Relations Office reported that they the situation had been "taken care of," but Spearman never revisited the site to see if the graffiti was removed. (Dft's 12(M) Stmt. ¶ 70).

**Retaliation**

After six months of these various incidents, events came to a head near the end of November. On November 17, 1997, Spearman submitted a complaint to the Labor Relations Office about the hugging incidents with Perez as well as Perez's behavior at the sexual harassment training. (Dft's Tab L). On November 24, 1997, one hour before the end of Spearman's shift, Perez requested that Spearman perform housekeeping duties, including washing the windows of the press machines. (Dft's 12(M) Stmt. ¶ 73; Pl's 12(N) Stmt. ¶ 40). Spearman objected, told Perez that he thought the assignment was punitive, and requested that a union committee man come down to the work floor. (Dft's 12(M) Stmt. ¶¶ 76, 77). Perez left the floor to find the union committee man, and when they returned, Spearman requested

that he be able to go to the medical department because he had a severe headache. (Dft's 12(M) Stmt. ¶ 78). After the incident, Spearman met with a union representative and was informed that he could not refuse cleaning assignments. (Dft's 12(M) Stmt. ¶ 80). While Spearman had previously performed housekeeping tasks, he had never been assigned washing windows. (Dft's 12(M) Stmt. ¶ 83; Pl's 12(N) Stmt. ¶ 41). Spearman stated that Perez had never previously assigned Blanket Utilities the task of washing windows. (Pl's 12(N) Stmt. ¶ 41). The defendant states that Perez assigned Spearman the task because Spearman had down time and still had an hour left on his shift. Also, the work floor was going to be inspected the next day and needed to be cleaned. (Dft's 12(M) Stmt. ¶¶ 74, 75).

After the window washing incident, Spearman went on medical leave in December of 1997 and did not return until May 4, 1998. (Pl's 12(N) Stmt. ¶ 43). During the time of these incidents, Spearman suffered from depression. Spearman was afraid to go to work, was worried about the possible actions of his coworkers, and was humiliated by the graffiti. (Pl's 12(N) Stmt. ¶ 45). During his medical leave, Spearman had in-patient hospital medicated treatment for his depression and met with a therapist and a doctor about his condition. (Pl's 12(N) Stmt. ¶ 44). Spearman lost $16,281.54 in wages during his medical leave. (Pl's 12(N) Stmt. ¶ 56). When he returned from his medical leave in May of 1998, Spearman found his tool box crushed, broken open, and his tools stolen. (Pl's 12(N) Stmt. ¶ 46). As a result of all these incidents, Spearman filed a two-count complaint under Title VII, alleging sexual harassment and retaliation.

**Standard for Summary Judgment**

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter if law." Fed.R.Civ.P. 56(c); *Cox v. Acme Health Serv., Inc.*, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, after viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hedberg v. Indiana Bell Tel. Co*, 47 F.3d 928, 931 (7th Cir. 1995). The party moving for summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hedberg*, 47 F.3d at 931. If this burden is met by the movant, the non-movant must then set forth specific facts to show that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U .S. at 324. While affidavits, depositions and interrogatories are acceptable evidence for the non-movant to present, these are not the exclusive forms of evidence that can be used in responding to summary judgment. Wright, Miller & Kane Federal Practice and Procedure: Civil 3d § 2721. In deciding a motion for summary judgment, the court must read the facts in a light most favorable to the non-movant. *Cuddington v. Northern Ind. Public Serv. Co.*, 33 F.3d 813, 815 (7th Cir. 1994). However, Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden

of proof at trial." *Celotex*, 477 U.S. at 322. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion: "there must be evidence on which they jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 250.

## Analysis

### Sexual Discrimination and Hostile Environment

Title VII of the Civil Rights Act of 1964 provides in part "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex . . . " 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has recognized that "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII has been violated." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993). The environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive as such. *Id.*, 510 U.S. at 21-22, 114 S.Ct. at 370-371. In order to determine whether an environment is hostile, the court must look at "all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*, 510 U.S. at 23, 114 S.Ct. at 371.

The Supreme Court has recognized not only that Title VII protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 103 S.Ct. 2622, 2630, but that Title VII recognizes same-sex sexual harassment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1001-1002 (1998). Same-sex sexual harassment is actionable to the extent that it occurs "because of" the plaintiffs sex. *Id.*, 118 S.Ct. at 1002.

The Supreme Court in *Oncale* identified several ways to find the inference of discrimination in a same-sex sexual harassment situation. First, if there are "explicit or implicit proposals of sexual activity," the inference could be drawn "if there were credible evidence that the harasser was homosexual."[3] *Oncale*, 118 S.Ct. 1002. "But," the court clarified, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* The inference is also possible when, for example, a woman harasses another woman "in such sex-specific and derogatory terms . . . as to make it clear that the harasser is

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[3] The sexual orientation of the perpetrator is irrelevant to drawing the inference of sexual discrimination in a same-sex sexual harassment situation. In the traditional male-female sexual harassment scenario, courts do not inquire into the sexual orientation of the male perpetrator. Courts may (correctly or incorrectly) *assume* the perpetrator is heterosexual. However, his sexual orientation is irrelevant, since the relevant question is whether the *actions* of the perpetrator created a hostile work environment because the victim was singled out because of *her* sex. The same relevant question should be the focus of the inquiry in a same-sex sexual harassment situation as well. See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 415 (7th Cir. 1997).

motivated by general hostility to the presence of women in the workplace." *Id.* Finally, an inference can be drawn when there is "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* Whichever method is used, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex." *Id.*

Before the Supreme Court's decision in *Oncale,* the Seventh Circuit examined same-sex sexual harassment in *Doe v. City of Belleville,* 119 F.3d 563 (7th Cir. 1997). Like the Supreme Court in *Oncale,* the Seventh Circuit in *Doe* also found that Title VII covers same-sex sexual harassment when the harassment occurred "because of" the plaintiff's sex. 119 F.3d at 568. The Seventh Circuit outlined two ways a plaintiff could prove that harassment in a same-sex situation was because of sex. First, sexual harassment can be inferred form the sexual character of the harassment itself, such as the use of sexual propositions or sexual derogatory language. Since the harassment has explicit sexual overtones, no additional proof that the harassment was "because of" sex is necessary. *Id.*, 119 F.3d at 576. Second, same-sex sexual harassment can be proven when the harassment is not necessarily overtly sexual, but is focused on a particular gender or a particular individual's projection of his or her gender. *Id.*, 119 F.3d at 575. The court found that the key to each inquiry was that the harassment altered the conditions of the plaintiff's work environment so much as to make the environment hostile to him or her as a man or as a woman. *Id.*, 119 F.3d at 578. "Thus, so long as the environment itself is hostile to the plaintiff because of her [or his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta?

misguided humor? boredom?) is beside the point." *Id.*, 119 F.3d at 577. Therefore, the key issues is that the plaintiff's employment has now become conditioned upon his or her willingness to endure harassment that is inseparable from his or her gender. *Id.*, 119 F.3d at 579.

This court recognizes that, in light of *Oncale*, the Supreme Court vacated the judgment in *Doe* and remanded the case to the Seventh Circuit. *City of Belleville v. Doe*, 118 S.Ct. 1183 (1999). The Seventh Circuit did not take another opportunity to comment on *Doe*. However, since *Oncale*, the Seventh Circuit ruled in another same-sex sexual harassment case, *Shepherd v. Slater Steels Corp.*, where the court recognized that the examples outlined by the Supreme Court were not exhaustive of the possible formulations of proof for a same-sex sexual harassment case. 168 F.3d 998 (7th Cir. 1999). This court finds that the reasoning in *Doe* is not inconsistent with *Oncale* and therefore *Doe* remains viable.

In the present case, there is enough evidence before the court that the inference can be made that Spearman was singled out for harassment "because of" his sex. Some of the comments were sexually explicit, such as the threat from Curtis that he would "fuck [his] little gay ass up." (Dft's 12(M) Stmt. ¶ 23). Also, Spearman appears to have been singled out because of the way he projected his gender, or how his gender was perceived by his co-workers. Co-workers speculated on Spearman's sexual orientation based upon their perception of him as a man, and not on any comment by Spearman himself on his sexual orientation. (See, for example, Curtis' deposition, pp. 101 -106). Title VII does not permit an employee to be treated adversely because his or her appearance or behavior does not conform to gender

stereotypes. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S.Ct. 1775, 1791 (1989). The Seventh Circuit supported this reasoning in the sexual harassment context in *Doe.* The Seventh Circuit found that the fact that the plaintiff in *Doe* was singled out for harassment because the way he projected his gender did not conform to his co-workers' idea of a way a "man" should act was sufficient proof of harassment. *Doe,* 119 F.3d at 580. "[A] man who is harassed . . . because . . . he exhibits his masculinity in a way that does not meet his co- workers' idea of how men are to appear and behave, is harassed 'because of' his sex." *Doe,* 119 F.3d at 581.

Even though this court finds that there could be an inference that Spearman was singled out "because of" his sex, the court grants summary judgment to the defendant because Spearman is not able to show that the harassment was sufficiently severe or pervasive to cause a change in employment conditions. The case law requires this court to determine if a reasonable person in Spearman's position, considering all the circumstances, would find the environment created by the actions of Curtis, Neeley, Perez, and others, hostile or sexually abusive. *Oncale,* 118 S.Ct. at 1003; *Shephard,* 168 F.3d at 1008. The court can conceive of a situation where continuing comments on an individual's sexual orientation, perceived or real, would create a hostile environment.[4] However, the set of facts in the present case

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[4] While the Seventh Circuit, at present, has decided that discrimination based upon sexual orientation is beyond the reach of Title VII, *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1084 (1984), a gay or lesbian, or someone who is perceived as so, can bring a suit when he or she is discriminated against because of his

does not create such a situation. For example, while the comments that Curtis made were crude and ignorant, they were not "so objectively offensive as to alter the conditions of the victim's employment." *Oncale,* 118 S.Ct. at 1003. Also, Curtis' comments were not continuous, such as they were in *Shepherd,* 168 F.3d 998 (7th Cir. 1999); *Johnson,* 125 F.3d 408 (7th Cir. 1997); or *Doe,* 119 F .3d 563 (7th Cir. 1996), but were instead sprinkled over a period of two years. As for the incidents with Neeley, while they were confrontational and threatening, they were not sexual in any way. Neeley never touched Spearman, never threatened Spearman in a physically threatening manner, nor explicitly targeted Spearman because of his sex, gender, or perceived sexual orientation. Granted, Neeley does not like Spearman and it can be fairly inferred that his dislike stems from Spearman's perceived sexual orientation. However, Neeley's conduct does not rise to the severity of an abusive environment. Though crude and ignorant, the conduct involved here does not amount to a violation of Title VII. See, e.g. *Shepherd,* 168 F.3d 998 (7th Cir. 1999); *Johnson,* 125 F.3d 408 (7th Cir. 1997); *Doe,* 119 F.3d 563 (7th Cir. 1996). Title VII is not a "general civility code of the American workplace," and thus personality clashes between coworkers that are not driven by

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or her sex. Harassment can be motivated by many factors--sex as well as sexual orientation--and just because one discriminatory motivation as of yet is not recognized as impermissible under Title VII does not release the employer from liability for discrimination because of sex under Title VII. Therefore, continuous comments by a harasser to a plaintiff, such as "fag," "dyke," "queer," could be covered by Title VII. See, e.g., *Nabozny v. Podlesny,* 92 F.3d 446, 454-58 (7th Cir. 1996).

discriminatory motives should be addressed elsewhere. *Id.*, at p. 1002.

**Retaliation**

In order to avoid summary judgment on his retaliation claim, Spearman must show that 1) he engaged in a statutorily protected activity; 2) he suffered an adverse employment action; and 3) there is a causal link between the protected activity and the adverse action. *Essex v. United Parcel Service*, 111 F.3d 1304, 1309 (7th Cir. 1997); *McKenzie v. Illinois Department of Transportation*, 92 F.3d 473, 483 (7th Cir. 1996). Spearman argues that Ford retaliated against him for filing complaints against their various employees. In particular, Spearman argues that Perez retaliated against Spearman for filing a complaint on November 11, 1997 regarding the hug incidents and the sexual harassment training incident. (Pl's Resp., pp. 15-17).

The Seventh Circuit has held that an adverse employment action is indicated by a termination of employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, or significantly diminished responsibilities. *Dey v. Colt Construction and Development Co.*, 28 f.3d 1446 (7th Cir. 1994). Since Spearman holds the same position today as he did in 1997, at the same plant, with no decrease in wages, benefits, or title, the closest Spearman can come to this standard is significantly diminished material responsibility by being assigned the task of washing windows. Spearman fails to meet this standard. While the parties dispute whether window washing is a part of the job requirements of a Blanker Utility, Ford puts forward a legitimate business reason for

Perez asking Spearman to wash windows. Spearman had extra time on his hands and the work floor needed to be cleaned to prepare for an inspection the following day. Minor changes in the routine for one single day does not rise to the level of an adverse employment action. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996).

**Conclusion**

For the foregoing reasons, defendant Ford Motor Company's ("defendant" or "Ford") motion for summary judgment on plaintiff Edison K. Spearman's ("plaintiff" or "Spearman") two count complaint brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., for sexual harassment and retaliation, is GRANTED.

Entered:

/s/_____
DAVID H. COAR
UNITED STATES DISTRICT JUDGE

Dated: 9/1/99

## APPENDIX C

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

[Filed December 6, 2000]

No. 99-3538

Edison K. Spearman,
*Plaintiff-Appellant*,

v.

Ford Motor Company,
*Defendant-Appellee*.

December 4, 2000

**Before**

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division

No. 98 C 452

**David H. Cōar**, *Judge*.

**ORDER**

Plaintiff-Appellant filed a petition for rehearing *en banc* on November 17, 2000. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED.

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Filed September 1, 1999]

Case Number: 98 C 452

| | |
|---|---|
| Edison Spearman | ) |
| | ) |
| v. | ) |
| | ) |
| Ford Motor Company | ) |
| | ) |

**JUDGMENT IN A CIVIL CASE**

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDER AND ADJUDGED that Defendant Ford Motor Company's Motion for Summary Judgment on Plaintiff Edison Spearman's Two Count Complaint brought under Title VII is Granted.

Summary Judgment is entered in favor of the defendant Ford Motor Company and against the plaintiff, Edison Spearman. This action is Closed.

Michael W. Dobbins, Clerk of Court

/s/_____
Patricia McQurter-Figgs, Deputy Clerk

Date: 9/1/1999